

bers directly after the Speaker has been elected and has been sworn, and before the completion of other organizational business or before the consideration of general legislative business.

The fourth aspect of procedure related to this chapter is the functions of officers. The receipt of credentials by the House, and the preparation and calling of the Clerk's roll, are functions exercised by the Clerk of the preceding House.⁽⁸⁾ The administration of the oath to Members and floor action taken on challenges are presided over by a newly-elected Speaker, whose scope of authority during the organizational period should be reviewed for a comprehensive understanding of how those orders of business are completed by the House.⁽⁹⁾

The final area of substantive procedure relating to the enroll-

ment of Members and to the administration of the oath is the delineation of authority between state and federal government. Since the House depends on the individual states for the administration of elections and the preparation of credentials, issues may be suggested in this chapter as to those powers reserved for the states and those granted to the House of Representatives under the U.S. Constitution. The reader is referred to other portions of this work for discussion of such issues.⁽¹⁰⁾

§ 2. Status of Members-and Delegates-elect

The issue has often arisen, both in Congress and in the courts, whether the scope of privileges and prerogatives enjoyed by Members of Congress fully extends to those persons elected to Congress but not yet sworn.⁽¹¹⁾

8. See 2 USC §26. For the authority and functions of the Clerk of the preceding House at the organization of Congress, see Ch. 1, §5, *supra*.

9. For the Speaker's functions and authority after he has been elected at the convening of a new Congress, see Ch. 1, §7, *supra*. For his entertainment of motions during the organizational period, see Ch. 1, §9, *supra*; for his rulings on action on resolutions, including those relating to oath administration, during organization, see Ch. 1, §12, *supra*.

10. See Ch. 8, *infra*, on elections and election campaigns, and Ch. 9, *infra*, on election contests, which discuss the respective roles of the state and federal governments.

11. In early times, Thomas Jefferson considered the status of Members-elect and concluded that a Member elected "is to every extent a Member except that he cannot vote until he is sworn" (Jefferson's Manual, *House*

Some of the statutory and constitutional provisions relating to the incidents of House membership, primarily those of qualifications and disqualifications, have produced lengthy House debate on whether they apply only to sworn Members or also to Members-elect before the assembly of Congress or before the administration of the oath.⁽¹²⁾ However, most such pro-

Rules and Manual § 300 [1973]), and as recently as 1933 Speaker Henry T. Rainey (Ill.) opined that Members-elect do not enjoy all the rights and privileges of Members until sworn (see §2.1, *infra*). For a lengthy and general discussion whether a Member-elect is as much an officer of the government before being sworn as after, see 1 Hinds' Precedents §185.

Although the Supreme Court has not specifically ruled on the status of Members-elect, various lower courts have considered the question (see, e.g., *U.S. v Dietrich*, 126 F 676 [C.C. Neb. 1904]). Several quasi-judicial opinions on the subject may be found in the Opinions of the Attorney General (see 14 Op. Att'y Gen. 133 [1872]; 14 Op. Att'y Gen. 406 [1874]; 16 Op. Att'y Gen. 271 [1879]).

12. The Senate has determined that Senators-elect must be at the time of election residents of the representative state but need not meet the age and citizen requirements until appearing to be sworn. See S. REPT. NO. 904, 74th Cong. 1st Sess. reprinted at 79 CONG. REC. 9651-53 [1935]. For a full discussion, see Ch. 7, *infra*. As to the holding of incom-

visions distinguish between Members-elect and Members either explicitly or by implication.⁽¹³⁾ This chapter will not attempt to discuss all, or even most, of the rights, privileges, immunities, and qualifications of membership in the House of Representatives.⁽¹⁴⁾

patible offices, the House has decided a Member-elect may retain such office until appearing to be sworn (for a summary list of related precedents and rulings, see *House Rules and Manual* §§95-98 [comment to U.S. Const. art. I, §6, clause 2] [1973]; for detailed analysis, see Ch. 7, *infra*).

13. For example, 39 USC §3210 (franking privilege) and 2 USC §34 (compensation) specifically refer to Representatives-elect. Although no constitutional provision uses the term "Member-elect" or "Representative-elect", the Constitution impliedly empowers Members-elect to vote for a Speaker (under art. I, §2, clause 5, the House chooses a Speaker before the House is sworn), and to demand the yeas and nays (art. I, §5, clause 3), and uses the term "Representatives" when referring to Members not yet sworn (see art. I, §6, clause 2 and art. VI, clause 3). Some sections of the United States Code similarly use the term "Members" when obviously referring to Member-elect. See 2 USC §25 (administration to Speaker of oath by "Member"); 2 USC §27 (changing the place of meeting before Congress convenes, to protect the health of "Members"). See also 2 USC §21 (administration of oath to "Senators").
14. For Members immunities, qualifications and disqualifications, see Ch. 7,

Only those aspects of membership which enable Representatives-elect to function in an official capacity after their election but before they have been sworn in will be discussed here.

The status of a Member-elect may be described first by the right to participate in proceedings after the convening of Congress but before the taking of the oath, and second by the constitutional and statutory privileges which become effective by force of election.

Three of the powers authorizing participation in proceedings arise from constitutional provisions: being called for the quorum,⁽¹⁵⁾ voting for Speaker,⁽¹⁶⁾ and demanding the yeas and nays.⁽¹⁷⁾ All of those steps may occur in the House before Members are sworn, and before their rights to seats are determined.⁽¹⁸⁾ As to the initial quorum call at the opening of a Congress, the right of a Member-elect to be included on the Clerk's roll and to be called for

the quorum is qualified by the statute which directs the preparing of the Clerk's roll. Only if the individual Member's-elect certificate of election, in due form, is on file with the Clerk is his right to be included on the Clerk's roll absolute.⁽¹⁹⁾ And only those Members whose names appear on the Clerk's roll are entitled to vote for a new Speaker at the beginning of a Congress or to otherwise participate in organizational proceedings prior to the administration of the oath.⁽²⁰⁾

The House, in its initial stages, could not complete organizational business if unsworn Members were not entitled to debate propositions, to propose motions, to

infra. For personal privileges of House membership, see Ch. 11, infra.

15. U.S. Const. art. I, § 5, clause 1.

16. U.S. Const. art. I, § 2, clause 5

17. U.S. Const. art. I, § 5, clause 3

18. For quorum calls and demands for the yeas and nays during organization see Ch. 1, § 9, supra. For the procedure of electing a Speaker, see Ch. 1, § 6, supra.

19. See *Page v U.S.*, 127 U.S. 67 (1888), for the proposition that it is a mandatory step for the Clerk to place on the Clerk's roll the name of a duly certified Member-elect, pursuant to 2 USC § 26. For the degree of discretion exercised by the Clerk in enrolling Members-elect, see § 4, infra.

20. While the Clerk is presiding, he refuses to recognize claimants to seats whose names do not appear on the Clerk's roll. 1 Hinds' Precedents § 86. When the time comes for oath administration, a claimant not on the roll may be admitted to membership (see § 5, infra) and may be permitted to participate in debate on his right to a seat (see 1 Hinds' Precedents 657-672 and Rule XXXII, clause 1, *House Rules and Manual* § 919 [1973]).

offer resolutions, and to raise points of order. Therefore, all Members-elect whose regular credentials are on file with the House may exercise such rights⁽¹⁾ and may also be named to, and serve on, House committees.⁽²⁾ In addition, a Member-elect may

1. See, generally, Ch. 1, *supra*, for the rules of proceeding during organization. Although there are no explicit rulings on the rights of Member-elect to generally participate in proceedings, those rights are unquestioned, since the body of those persons assembled is a "House" before organization is completed (see 1 Hinds' Precedents §82). Members-elect have by rule (Rule XXXII clause 1, *House Rules and Manual* §919 [1973], not technically in effect before the adoption of rules) the privilege of admission to the floor.
2. A Member-elect may be named to a committee before he is sworn (see 4 Hinds' Precedents §§4477, 4483, 4484) and the fact that his seat is being contested is not necessarily taken into account in assigning him to committees (8 Cannon's Precedents §2194). Rank on committees is fixed by the order in which Members were elected and a Member-elect may be restored to original rank after resolution of a contest for his seat (see 8 Cannon's Precedents §2196). Jefferson's Manual states that "before a return be made a Member elected may be named of a committee, and is to every extent a Member except that he cannot vote until he is sworn." *House Rules and Manual* §300 (1973).

challenge the right of another Member-elect to be sworn,⁽³⁾ and a Member-elect may be permitted to debate a proposition related to his own right to a seat.⁽⁴⁾ (Contestants to the seats of Members-elect may also be granted the privilege of the floor and the right of debate by the House membership.)⁽⁵⁾

Members-elect are entitled to those privileges and immunities which stem from article I, section 6, of the Constitution and from various statutory provisions.⁽⁶⁾ Clause 1 of that section authorizes Members to receive compensation for their services; although the provision does not specifically include Members-elect, Congress has provided by statute for the compensation of Representatives and Delegates-elect, with credentials in due form, from the beginning of the term of Congress.⁽⁷⁾

3. See §6.1, *infra*.
4. See §2.5, *infra*.
5. Contestants in election cases have the privilege of the floor under Rule XXXII clause 1, *House Rules and Manual* §919 (1973). For the right of contestants to participate in proceedings, see Ch. 9, *infra*.
6. For a detailed analysis of immunities, qualifications, and disqualifications of Members, and for the time at which they become effective, see Ch. 7, *infra*.
7. 2 USC §34, providing for compensation from the beginning of the term to the beginning of the session; 2

Additionally, Representatives, Delegates, and Resident Commissioners elected to fill unexpired terms are salaried from the date of their election.⁽⁸⁾ A former provi-

USC § 35 operates after the taking of the oath. If a Member-elect takes the oath and his seat after the commencement of a Congress, he nevertheless receives his salary retroactive to the beginning of the term (see 2 Hinds' Precedents § 1206), but disbursement by the Sergeant at Arms on a monthly basis is not made until the Member takes the oath.

The possibility of double compensation may arise, if a Member-elect retains an incompatible office beyond the beginning of the term of Congress and before he appears to be sworn. On a recent occasion, a Senator-elect who retained an incompatible office six days after the convening of Congress waived his congressional salary for that period (see § 2.6, *infra*). Although an early Attorney General's Opinion (14 Op. Att'y Gen. 406 [1874]) proposed that a Member-elect was entitled to receive pay for both an incompatible office and his congressional seat until appearing to be sworn, a House report cited at 1 Hinds' Precedents § 184 stated (*dicta*) that the precedents of the House neither allowed or disallowed such double compensation.

8. 2 USC § 37. This provision differs from the section relating to Senators who are elected to fill unexpired terms; they receive compensation only from the date they "qualify." 2 USC § 36. The Senate has deter-

sion, forestalling compensation for a Member-elect whose seat was to be contested, has been repealed.⁽⁹⁾

The other privileges allowed Members of Congress by clause 1 (and which are discussed in detail elsewhere in this work)⁽¹⁰⁾ are the privilege from arrest, applicable to Members-elect traveling to Washington for the assembly of Congress,⁽¹¹⁾ and the immunity

mined that a Senator-elect to fill a vacancy does not "qualify" for compensation until he has taken the oath See Senate resolution of Apr. 29, 1957, 103 CONG. REC. 6060, 85th Cong. 1st Sess.

9. The provision, contained in the Act of Mar. 3, 1873, Ch. 226, § 1, 17 Stat. 488, and repealed by the Act of Mar. 3, 1875, Ch. 130, § 1, 18 Stat. 389, empowered the Clerk to omit from the roll, for purposes of compensation, the name of a Member-elect, until the determination of his right to the seat, upon notice that his seat would be contested. Currently, the returned Member-elect is entitled to the compensation, and if a contestant is subsequently chosen to fill the seat, the contestant is entitled to congressional salary only from the time the compensation of his "predecessor" has ceased. *Page v U.S.*, 127 U.S. 67 (1888).
10. See Ch. 7, *infra*, for immunities, and Ch. 11, *infra*, for the personal privilege of a Member.
11. Privilege from arrest "takes force by place of the election." Jefferson's Manual, *House Rules and Manual* § 300 (1973). See also 1 Hinds' Prece-

against being questioned for any speech or debate in the House, which would seem to apply to Members-elect as well as to qualified Members.⁽¹²⁾

dents §499 (on a related subject), stating that the privilege is “granted by the Constitution to Representatives before a meeting of the House,” in accordance with the common law of Parliament. For an early lower court decision holding that the privilege from arrest extended to the return to his home state of a challenged Member-elect, delayed by want of funds, against whom a contest was decided by the House, see *Dunton and Co. v Halstead*, 2 Clark (Pa. Law Journal Reports) 236 (D.C. Phil. 1840). In that case, however, the claimant to the privilege had journeyed to Washington with the Governor’s official commission to represent Pennsylvania. Since the House requires regular credentials as proof of election (2 USC §26), presumably only a Member-elect who is entitled to have his name placed on the Clerk’s roll would come under the penumbra of the privilege.

12. As the House is technically in session during organization and before swearing-in ceremonies (1 Hinds’ Precedents §§82, 87, 88), and as enrolled Members-elect engage in debate before taking the oath (*i.e.*, debate before Speaker’s election, Ch. 1, *supra*, and debate on the taking of the oath itself, §6, *infra*), it may be assumed that Members-elect enjoy the privilege (see 2 Hinds’ Precedents §1655 and 3 Hinds’ Precedents §2675 for the proposition that the

There are, in addition, a number of miscellaneous privileges necessary to the official functioning of Members and Members-elect. Members-elect as well as Members are expected to comply with House traditions as to decorum, and conduct.⁽¹³⁾ The franking privilege is specifically extended to Members-elect, although the scope of the privilege is more restricted for Members-elect than for qualified Members.⁽¹⁴⁾ In addition, Members-elect are entitled by statute and by practice to draw rooms in the House office buildings before they are sworn.⁽¹⁵⁾

The rights and privileges of Delegates-elect and Resident Commissioners-elect are similar to those for Members-elect. By stat-

immunity applies to “things done in a session of the House by one of its Members in relation to the business before it”).

13. For example, by custom of the House, Members-elect may not approach the desk during the call of the roll for the election of a Speaker. 1 Hinds’ Precedents §623.
14. Members-elect have the right to send under their frank correspondence on official business, under 32 USC §3210. They do not have the franking privilege for public documents (32 USC §3211), for the *Congressional Record* (32 USC §3212), or for agriculture reports (32 USC §3213).
15. See 40 USC §§177–184 and *House Rules and Manual* §985 (1973).

ute or by House practice, many of the rights, privileges, and powers of Members-elect are extended to those officials.⁽¹⁶⁾ The important distinction is that Delegates and Resident Commissioners, although they are sworn,⁽¹⁷⁾ are not included on the Clerk's roll to establish a quorum⁽¹⁸⁾ and are not entitled to vote either for the Speaker or on other propositions in the House.

Rights and Privileges Generally

§ 2.1 Members-elect are required by law to take an oath of office and until they so subscribe do not enjoy all the rights and prerogatives of a Member of Congress.

On Mar. 13, 1933,⁽¹⁹⁾ Speaker Henry T. Rainey, of Illinois, re-

16. For example, Pub. L. 91-405, §294(a), Sept. 22, 1970, extended to the D.C. Delegate, among other provisions, the laws as to taking the oath and receiving compensation. For the rights and privileges of Delegates and Resident Commissioners in general, see Rule XII, *House Rules and Manual* §740, and comment thereto, 741 (1973).

17. See § 5, *infra*.

18. See § 4, *infra*.

19. 77 CONG. REC. 283, 73d Cong. 1st Sess.

sponded as follows to a parliamentary inquiry by Mr. Bertrand H. Snell, of New York:

MR. SNELL: In what way does it change the status of a Member-elect to have the oath administered to him?

THE SPEAKER: He then becomes a full-fledged Member of the House of Representatives, without question.

MR. SNELL: Is he not enjoying all the rights and privileges even at the present time?

THE SPEAKER: The Chair thinks he enjoys many of the privileges, but in order to become a Member he must take the oath prescribed by law.

MR. SNELL: It bestows on him actual membership.

THE SPEAKER: He then has actually become Member

Right to Vote

§ 2.2 Members-elect not responding to the roll call on opening day and not appearing to take the oath en masse with the membership of the House are not included on further roll calls or entitled to vote until they have been sworn.

Those Members-elect to the 91st Congress who did not appear on the opening day, Jan. 3, 1969,⁽²⁰⁾ for the call of the Clerk's roll to establish a quorum and for the swearing in of Members-elect en

20. 115 CONG. REC. 12-15, 91st Cong. 1st Sess.

masse were not placed on the regular roll call of the House for yeas and nays votes until they appeared to be individually sworn by the Speaker. On Jan. 6, Mr. Charles A. Mosher, of Ohio, was sworn, on Jan. 7, Mr. Robert Taft, of Ohio, on Jan. 8, Mr. Donald E. Lukens, of Ohio, on Jan. 9, Mr. Ogden R. Reid, of New York, and on Jan. 28, Mr. Richard T. Hanna, of California.

§ 2.3 Members-elect to fill unexpired terms during the term of a Congress are not entitled to be counted for a quorum or to vote for a new Speaker at the opening of a new session.⁽¹⁾

On Jan. 10, 1962,⁽²⁾ the opening day of the second session, Mr. Henry B. Gonzalez, of Texas, Mr. Joe Waggoner, Jr., of Louisiana, and Mr. Lucien N. Nedzi, of Michigan, all Representatives-elect to fill vacancies, with credentials on file with the Clerk, were not sworn in until after the election of a new Speaker (Speaker

Sam Rayburn, of Texas, had died during the *sine die* adjournment). Their names were not placed on the roll to establish a quorum or to elect a Speaker.

Right to Demand Yeas and Nays

§ 2.4 The yeas and nays may be demanded by one-fifth of the Members before the organization of the House.

On Jan. 4, 1965,⁽³⁾ Speaker John W. McCormack, of Massachusetts, ruled, in answer to a parliamentary inquiry, that prior to rules adoption and prior to the organization of the House, one-fifth of the Members present could demand the yeas and nays.⁽⁴⁾

Right to Debate of Challengee

§ 2.5 A Member-elect, asked to stand aside when the oath is administered to other Members-elect may, by unanimous consent, be permitted to participate in debate on a resolution relating to his right to be sworn.

1. This practice, which has occurred only in the instant case, differs from the practice at the opening of a new Congress, where all Members-elect with regular credentials are called to establish a quorum and to vote for a Speaker (see § 4, *infra*).

2. 108 CONG. REC. 5-7, 87th Cong. 2d Sess.

3. 111 CONG. REC. 19, 20, 89th Cong. 1st Sess.

4. For a ruling by the Clerk, presiding before the election of a Speaker, that the yeas and nays could be demanded by Members-elect, see 1 Hinds' Precedents §91.

On Jan. 10, 1967,⁽⁵⁾ during debate on a resolution relating to the right to be sworn of Mr. Adam Clayton Powell, Jr., of New York, who had been asked to stand aside when the oath was administered to other Members, unanimous consent was asked by Mr. Carl Albert, of Oklahoma, that Mr. Powell be permitted to participate in the debate. The request was granted and the challenged Member-elect delivered remarks in debate.

Right to Compensation

§ 2.6 A Senator-elect who postponed the choice between his congressional seat and an incompatible office six days beyond the convening of Congress waived his congressional pay for that period.

Mr. Jacob Javits, Senator-elect from New York, did not take the oath of office in the 85th Congress until Jan. 9, 1957, although the Senate had convened on Jan.⁽⁶⁾ Mr. Javits appeared late because he did not resign from his position as Attorney General of New York until the day he appeared to take the oath.⁽⁷⁾ He waived his congressional

salary for the period during which he delayed taking the oath.⁽⁸⁾

§ 3. Presentation of Credentials

The device through which the House satisfies itself that it is composed at its first meeting of duly-elected Representatives is the presentation of credentials.⁽⁹⁾ Although the credentials themselves may give rise to substantive questions as to form, validity, and grounds for challenge,⁽¹⁰⁾ the presentation and use of the credentials is largely an administrative matter. Although there are still differences among the states in the preparation of credentials, and in their trans-

No. 92-8, pp. 1183-84, 92d Cong. 1st Sess. (1971).

8. *Senate Manual* §863 (1971) (statistical section). An early opinion of the Attorney General has proposed that until taking the oath a Representative-elect could receive salary for both his congressional position and his other office. 14 Op. Att'y Gen. 408 (1874), cited at 2 USCA §25.

9. For a discussion of the function of credentials in legislative organization, in general, see 1 Hinds' Precedents §631.

10. See Ch. 8, *infra*, for the substantive aspects of credentials as related to elections and election campaigns.

5. 113 CONG. REC. 15, 90th Cong. 1st Sess.

6. 103 CONG. REC. 340, 85th Cong. 1st Sess.

7. *Biographical Directory of the American Congress 1774-1971*, S. Doc.